Nos. 22,441 and 22,441-A

United States Court of Appeals

For the Ninth Circuit

SHELL OIL COMPANY, *Appellant,* vs. RUSSELL L. JONES, et al., *Appellees.*	No. 22,441
RUSSELL L. JONES, et al., *Appellants,* vs. SHELL OIL COMPANY, *Appellee.*	No. 22,441-A

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEES (IN No. 22,441) AND APPELLANTS (IN No. 22,441-A)

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JURISDICTION

This is in answer to a brief filed by Shell Oil Company (hereinafter referred to as "Shell") appealing from an order of the United States District Court for the Northern District of California entered on October 12, 1967 (R. 152-153) which granted a protective order (see Appendix "B" of this brief) pursuant to Rule 30(b) of the Federal Rules of Civil Procedure sealing the deposition

testimony of the 42 Shell Oil dealers (hereinafter referred to as "plaintiffs") who are plaintiffs in the present civil antitrust action.

This brief is also submitted in support of plaintiffs' separate appeal from an order (see Appendix "D" of this brief) of the same District Court entered on November 20, 1967 which denied a protective order sought pursuant to Rule 33 (insofar as it incorporates Rule 30(b)) to seal the plaintiffs' answers to certain of Shell's first set of written interrogatories (specifically, numbers 5, 12, 13, 14, 18, 19 and 20 which are set forth in Appendix "C").

The District Court has jurisdiction in this action pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 15. The plaintiffs contend, however, that the orders here involved are not appealable and thus this Court lacks jurisdiction to decide the issues presented herein. However, if this Court exercises jurisdiction either through appeal (28 U.S.C. § 1291) or extraordinary remedy (28 U.S.C. § 1651(a)) it should consider the two conflicting District Court orders together. For that reason, plaintiffs filed a Notice of Appeal from the denial of its motion for a Protective Order on December 11, 1967.

STATEMENT OF THE CASE

In this present cause filed on June 16, 1967, 72 independent Shell Oil Company dealers (located throughout Northern California) have instituted a civil antitrust action against their supplier, Shell Oil Company. The complaint (R. 1-11) charges that Shell, in furtherance of a

program intended to injure and impair its competitors, did embark upon a program of predatory pricing throughout Northern California in violation of Sections 1 and 2 of the Sherman Act and Section 2 of the Robinson-Patman Act. The complaint further charges that Shell, by economic coercion and duress, is able to dominate the important business decisions of its supposedly "independent" dealers thereby enabling it to establish and enforce its predatory prices for the purpose of eliminating competitors at various levels of the marketing process. The complaint seeks unascertained damages believed to be in excess of $1,775,000 before trebling. At present there remain 42 plaintiffs.

The defendant Shell Oil Company then filed a counterclaim (R. 7, 11-19) against each of the 72 named plaintiffs (and unnamed co-conspirators identified only as dealers, associations of dealers and agents of same) alleging that said parties violated Section 1 of the Sherman Act by combining and conspiring to: (a) raise the retail price of gasoline; (b) increase and maintain uniform margins for service station dealers; (c) eliminate price signs; (d) eliminate trading stamps as a competitive factor; and (e) harass non-conforming service station dealers.

The allegations made by Shell in its counter-claim are substantially identical to the allegations contained in an indictment filed by the Government in the criminal case currently pending entitled *United States v. California Shell Dealers Association, Inc., et al.* (Criminal Case No. 41348 in the Federal District Court for the Northern District of California, R. 75-82).

Among the defendants in the criminal action are two dealer associations, the California Shell Dealers Association (in which each of the named plaintiffs in the present cause is a member), the Santa Clara County Shell Dealers Association (in which many of the named plaintiffs are also members), and three named dealers, John A. Mullins, Joseph Chandler and Earl C. Schweitzer (each of whom are plaintiffs in the present civil action). All of the accused defendants have pleaded not guilty, but the trial has been delayed and removed from the calendar pending disposition of a pre-trial motion under Rule 16 of the Federal Rules of Criminal Procedure.

Because of the similarity of the criminal indictment and the civil counter-claim, plaintiffs have contended that by submitting to the liberal discovery permitted by the Federal Rules of Civil Procedure, they would be compelled to incriminate themselves. Rather than move to stay the civil action until the termination of the already delayed criminal proceeding, plaintiffs sought to protect their constitutional privilege against self-incrimination by invoking the Federal Rules of Civil Procedure, Rule 30(b) and Rule 33 (insofar as it incorporates Rule 30(b)) which permits the sealing of depositions and interrogatory answers, prohibiting same from being examined except upon order of the Court and thereby keeping same confidential as against everyone except the parties to the civil action. Such protective orders would preclude the Government from utilizing the fruits of civil discovery as evidence and investigatory leads in the criminal prosecution of those presently indicted (as well as those plaintiffs who by their deposition testimony or answers to interrogato-

ries may implicate themselves in the alleged criminal activity). These protective orders would not limit the defendant Shell in its discovery techniques or access to information.

On October 12, 1967, the Honorable Stanley A. Weigel granted plaintiffs' motion for a protective order pursuant to Rule 30(b), sealing plaintiffs' deposition testimony. (See Appendix "B" hereto and R. 152-153.) Shell here appeals that order. On November 20, 1967, the Honorable William T. Sweigert denied plaintiffs' motion for a protective order pursuant to Rule 33 (insofar as it incorporates Rule 30(b)) to seal the plaintiffs' answers to numbers 5, 12, 13, 14, 18, 19 and 20 of defendant's first set of written interrogatories. Plaintiffs here appeal from the denial of that protective order. (The interrogatories involved are set forth in Appendix "C" and Judge Sweigert's order is set forth in Appendix "D" of this brief.)

ISSUES PRESENTED

A. Whether the orders of the District Court granting the plaintiffs' motion under Federal Rules of Civil Procedure 30(b), and denying plaintiffs' motion under Rule 33 (insofar as it incorporates Rule 30(b)) are appealable?

B. Whether the District Court in granting a protective order pursuant to Federal Rule of Civil Procedure 30(b) sealing the plaintiffs' deposition testimony, and protecting said plaintiffs' constitutional privilege against self-incrimination thereby abused its discretion?

C. Whether the District Court's denial of a protective order pursuant to Federal Rule of Civil Procedure 33 (insofar as it incorporates Rule 30(b)) and its refusal to seal plaintiffs' answers to defendant's written interrogatories is an abuse of discretion which thereby results in an unjustifiable abridgment of the plaintiffs' privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution?

SPECIFICATION OF ERROR

The District Court erred in denying plaintiffs' motion for a protective order pursuant to Rule 33 (insofar as it incorporates Rule 30(b)) of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE ORDERS OF THE DISTRICT COURT BELOW ARE NOT FINAL APPEALABLE ORDERS. THEREFORE THIS APPEAL SHOULD BE DISMISSED.

The actions of the District Court below regarding plaintiffs' requests for protective orders relate to matters of discovery and primarily involve the discretion of the trial judge. It is well established that a discovery order is not "a final order and thus is not appealable". 2A Barron & Holtzoff, *Federal Practice and Procedure,* § 657 (1961), citing *Griffin v. Locke,* 286 F.2d 514 (9th Cir. 1961); *English v. Cunningham,* 282 F.2d 839 (D.C. Cir. 1960).

In *Cimijotti v. Paulsen,* 323 F.2d 716 (8th Cir. 1963), the District Court's refusal to require witnesses to an-

swer certain questions asked of them in a deposition was held not to be a final order and hence non-appealable.

In its brief, Shell cites many cases in an attempt to circumvent the established rule; however, Shell fails to persuasively demonstrate the need for appellate review of discovery orders. Shell urges (Brief, p. 18) that Judge Weigel's order sealing plaintiffs' depositions is "final" because it conclusively "determines Shell's right to retain possession of transcripts of depositions". However, as is developed more fully in other portions of the argument below, these deposition transcripts have no inherent value. They are of use only as memorializing information regarding the facts of this case. They are of value only in the litigation process. If the case should be settled as Shell implies, the depositions become useless. If the case proceeds to judgment, that will be time enough for appellate review of this matter.

Moreover, Shell's request for a Writ of Mandamus must also fail. The federal courts have consistently refused to allow the extraordinary writs to be used for reviewing discovery orders. *Will v. United States,* 389 U.S. 90 (1967); 2A Barron & Holtzoff § 657, citing *Pennsylvania R. Co. v. Kirkpatrick,* 203 F.2d 149 (3rd Cir. 1953); *Belships Co., Ltd. v. France,* 184 F.2d 119 (2nd Cir. 1950); *Benioff Co. v. McCulloch,* 133 F.2d 900 (9th Cir. 1943).

The Tenth Circuit has recently recognized that only under exceptional circumstances should a writ of mandamus issue in matters relating to discovery. To justify the issuance of the writ, the trial court must be guilty of a clear abuse of discretion or an abdication of

the judicial function. *Paramount Film Dist. Co. v. Civic Center Theatre, Inc.,* 333 F.2d 358 (10th Cir. 1964).

It is true that in the present case, two different District Court judges issued orders (concerning the same case) which are somewhat inconsistent. However, each judge was exercising his independent discretion regarding the scope of pre-trial discovery. The trial judge should be given great leeway in determining the ground rules for discovery. Such orders as the trial court makes are not final orders, hence the time is not right for appellate review. These appeals should be dismissed.

However, if this Court chooses to review Judge Weigel's order below, then it should likewise review the inconsistent ruling of Judge Sweigert (either as an appeal under 28 U.S.C. § 1291 or as a petition for a Writ of Mandamus under 28 U.S.C. § 1651(a)). The plaintiffs contend that the granting of a protective order by Judge Weigel was a sound and enlightened exercise of discretion in that it reflects the policy of protecting the plaintiffs' constitutional privilege against self-incrimination. On the other hand, Judge Sweigert's refusal to seal certain of plaintiffs' answers to interrogatories was an abuse of discretion in that it will necessarily result in an abridgment of the plaintiffs' constitutionally protected privilege.

II. PROTECTIVE ORDERS SEALING PLAINTIFFS' DEPOSITION TESTIMONY AND ANSWERS TO WRITTEN INTERROGATORIES ARE NECESSARY IN ORDER TO PRESERVE AND PROTECT THE PLAINTIFFS' PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION. ANY FAILURE TO ISSUE SUCH PROTECTIVE ORDERS IN THIS CASE MUST BE RECOGNIZED AS AN ABUSE OF DISCRETION.

A. Issuance of the Protective Orders Sealing Deposition Testimony and Interrogatory Answers Would Protect Each Plaintiff from Coercive Self-Incrimination and Encourage the Full and Cooperative Disclosure Required by the Federal Pre-Trial Discovery Rules. Such Orders Are Necessary in this Case to Protect the Plaintiffs from Annoyance, Embarrassment and Oppression.

The liberality of pre-trial discovery under the Federal Rules of Civil Procedure is surely one of the most beneficial and enlightened developments in modern jurisprudence. Private party litigants in the federal courts have the right to full pre-trial disclosure of their opponents' cases. Provisions for protective orders, however, "were adopted as a safeguard for the protection of parties and deponents in view of [this] almost unlimited right of discovery given by Rule 26". 2A Barron & Holtzoff, *Federal Practice and Procedure,* § 715 (Wright Ed. 1961). As one distinguished scholar has stated, the purpose of the protective order is "to prevent abuse of the discovery rules". Sunderland, *The New Federal Rules,* 45 W.Va. L.Q. 26 (1938).

In our present case, Shell, in (a) defending against the plaintiffs' claims and (b) pursuing its counterclaims against the plaintiffs seeks discovery of facts which of necessity must relate to alleged violations by plaintiffs of certain antitrust laws. The plaintiffs do not here con-

tend that Shell is prohibited from pursuing the various avenues of civil discovery. However, the plaintiffs urge this Court to recognize that the allegations made by Shell in its counterclaim are in substance identical to the charges made by the United States of America in a criminal antitrust proceeding now pending before the District Court for the Northern District of California. (Cf. R. 7, 11-19 with R. 75-82.) The criminal action has been filed against two service station dealer associations and three named individuals (John A. Mullins, Joseph Chandler and Earl C. Schweitzer—all of whom are party plaintiffs in the present civil action). *United States v. California Shell Dealers Association, et al.* (Criminal Case No. 41348) (R. 75-82). In point of fact, all of the individual plaintiffs herein are members of one or both of the dealer associations named as defendants in the criminal action. (R. 1-11.)

The very existence of concurrent criminal and civil actions which involve the same parties and relate to identical occurrences and transactions creates a danger that the avenues and fruits of civil discovery will be used to circumvent the parties' privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution. If the plaintiffs' deposition testimony and answers to interrogatories are not protected, then, as public records they become fully accessible to and usable by federal prosecuting authorities. *Barron & Holtzoff, supra.*

To prevent the emasculation of their privilege against self-incrimination the plaintiffs sought an order pursuant to Federal Rules of Civil Procedure 30(b) which provides in part:

> "After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order . . . that *the examination shall be held with no one present except the parties* to the action and their officers or counsel, or that *after being sealed the deposition shall be opened only by order of the court* . . . or the court may *make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression.*" (Emphasis added.)

Pursuant to Rule 30(b) Judge Stanley Weigel issued an order, dated October 12, 1967, sealing the plaintiffs' depositions. (R. 152-153.) Because this order was necessary to guard the plaintiffs' privilege against self-incrimination and to "protect" the plaintiffs "from annoyance, embarrassment and oppression" it was issued pursuant to a valid and extremely sound exercise of discretion by Judge Weigel.

Subsequently the plaintiffs also sought a protective order sealing its answers to written interrogatories (Shell's First Set numbers 5, 12, 13, 14, 18, 19 and 20, all of which are set forth in Appendix "C", *infra),* in accordance with Federal Rules of Civil Procedure 33 which provides in part:

> ". . . The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

On November 20, 1967, Judge William Sweigert denied the plaintiffs' motion (Appendix "D", *infra).* The result of this denial is to compel all of the plaintiffs to submit

information which could implicate them in the alleged conspiracy which is the subject matter of the criminal antitrust action. This flagrant disregard for the plaintiffs' privilege against self-incrimination clearly constitutes an abuse of discretion by the court below and an impairment of the plaintiffs' constitutionally protected liberty.

Plaintiffs contend that an enlightened and rational judicial resolution of this present conflict can be achieved only through the granting of both protective orders. Such orders would effectively protect plaintiffs from self-incrimination and at the same time permit liberal discovery by Shell. Indeed, if both protective orders are granted, not only those plaintiffs herein who are named defendants in the criminal action, but all of the plaintiffs in the present action (each of whom is now living under the specter of potential involvement in the criminal prosecution) will be encouraged to more willingly cooperate in the discovery process.

In opposing the protective orders, Shell has contended that those plaintiffs who are not named defendants in the criminal action have no right to invoke a privilege against self-incrimination. This contention is wholly without merit. The Ninth Circuit Court of Appeals has on numerous occasions followed the controlling test of *Hoffman v. U.S.*, 341 U.S. 479 (1951). That test does not limit the privilege to only those individuals who are under indictment or otherwise formally charged with criminal activity. On the contrary, as Judge Koelsch of this Court stated in *Hashagen v. U.S.*, 283 F.2d 345, 348 (9th Cir. 1960):

> "The 'guarantee against testimonial compulsion' embodied in the Fifth Amendment to the United

> States Constitution must be liberally construed and broadly applied in order to sustain fully the basic right it was designed to protect. . . . The *privilege* to remain silent may also be *validly asserted where an answer to a question would be likely to provide a lead or clue to a source of evidence of such crime* and thus furnish a *means of securing* one or some of the *'links in the chain of evidence' required for a federal prosecution of the witness.''* (Emphasis added.)

Thus, witnesses in non-criminal proceedings and witnesses who are not formally charged with a crime may nevertheless invoke their constitutional right to remain silent whenever they are asked a question calling for information which could possibly implicate them in alleged criminal activity. *Hoffman v. U.S., supra; Malloy v. Hogan,* 378 U.S. 1, 11-13 (1964); *Blau v. U.S.,* 340 U.S. 159 (1950); *Slochower v. Bd. of Education,* 350 U.S. 551 (1956); *Counselman v. Hitchcock,* 142 U.S. 547 (1892); *Alexander v. U.S.,* 181 F.2d 480 (9th Cir. 1950); *Shane v. U.S.,* 283 F.2d 355 (9th Cir. 1960).

The interrogatories propounded to the plaintiffs by Shell clearly call for information which could implicate each or any of the plaintiffs in the alleged criminal conspiracy which the Government is in the process of prosecuting. Each of the plaintiffs is a member of one or more dealer associations presently under indictment, and information furnished by any plaintiff (either through a deposition or an interrogatory answer) could provide a ''lead or clue to a source of evidence'' which would implicate such plaintiff in the alleged criminal conspiracy to violate the antitrust laws. As such the deposition tes-

timony and/or interrogatory answers of the plaintiffs could "furnish a means of securing one or some of the links in the chain of evidence required for a federal prosecution of the witness".

Because of the generality and breadth of information which may be relevant to an antitrust claim, discovery is necessarily extensive in scope. *Pennington v. United Mine Workers,* 325 F.2d 804, 811 (6th Cir. 1963) (reversed on other grounds, 381 U.S. 657); *Independent Production Corp. v. Loew's,* 22 F.R.D. 266 (S.D.N.Y. 1958); 2A Barron & Holtzoff, *Federal Practice and Procedures,* § 715 (1961). In its deposition examination, just as in its written interrogatories, Shell will doubtlessly wish to explore in detail the precise areas which the Government's pending criminal action concerns. Each of the plaintiffs would then be justified in asserting the privilege for fear that "the answers . . . *possibly* have [a] tendency to incriminate". *Hoffman v. U.S., supra,* at p. 488. The presence and frequent but justified assertion of this constitutional right will disrupt and frustrate Shell's attempt to conduct a rational and orderly program of discovery. Without the protective orders, it would be only natural for the plaintiffs to give extremely guarded testimony and answers. For example, the specific interrogatories (see Appendix "C" of this brief) involved in plaintiffs' motion below call for information from each plaintiff as to gasoline prices, dates of changes in prices (Interrog. No. 5), practices regarding trading stamps (Interrog. No. 12), practices regarding the posting of price signs (Interrogs. Nos. 13 and 14) and activities within the indicted trade associations (Interrogs. Nos. 18, 19 and 20). All of these alleged activities are specified in the criminal indictment.

(R. 75-82.) Plaintiffs are naturally apprehensive about furnishing such information for fear of implicating themselves in the alleged conspiracy which the Government contends existed. However, the granting of the orders would make invocation of the privilege unnecessary thereby avoiding interference with Shell's discovery and encouraging the plaintiffs to fully cooperate in the discovery process.

Nothing in the record supports Shell's contention (at p. 15 of its brief) that the Antitrust Immunity Statute, 32 Stat. 904, 15 U.S.C. § 32 is applicable to this case. In *Brown v. U.S.*, 359 U.S. 41 (1959) cited by Shell, the testifying party was assured of *immunity from prosecution* prior to being held in contempt for refusal to testify. In fact, Shell has previously admitted that it desires to share the information it uncovers through discovery with the Government's prosecuting officials. (See Appendix "A" of this brief for the letter from the Department of Justice to the attorney for Shell, requesting copies of all depositions taken in connection with the civil case.) This will directly and effectively aid the Government's *present* criminal prosecution. Any mention of the immunity act, then, must be recognized as a subterfuge.

Nor does Shell offer any authority to support its unique contention (Brief, p. 16) that the order requiring it to turn over transcripts of the depositions to plaintiffs deprives Shell of its property without due process of law. Shell would ask this Court to believe that such transcripts have some inherent value. In fact, such depositions are of value only as a means of obtaining information relevant to the litigation. The protective order with its inci-

dental requirement of returning deposition transcripts to the plaintiffs is, then, but a necessary means of keeping the coercively revealed information confidential and thereby adequately protecting parties from compelled self-incrimination. Such a requirement is wholly consistent with the policies of the Fifth Amendment to the United States Constitution and with the dictates of Rule 30(b) of the Federal Rules in protecting parties "from annoyance, embarrassment or oppression." *International Products v. Koons,* 325 F.2d 403 (2nd Cir. 1963).

Recently, the Third Circuit recognized the propriety of a protective order to shield parties in civil antitrust actions from incriminating themselves in related pending criminal prosecutions. *U.S. v. American Radiator & Standard Sanitary Corp.,* 1967 Trade Cases No. 72,311 (3rd Cir. Cases No. 16,764 and 16,765, 1967). There, the District Court had stayed civil discovery pending the termination of a related criminal action. The Court of Appeals reversed. Judge Hastie observed that protective orders sealing discovery would be more appropriate to obviate possible self-incrimination by those who were defendants in the criminal action and those who, though not named, were apprehensive about revealing possible implication in the alleged criminal conspiracy.

Moreover, the Court further recognized that without a protective order, the information discovered would be open to possible publication by the mass media, thereby impeding the selection of an unbiased jury at the criminal trial. Judge Hastie stated:

> "However, we recognize that the widespread publication of such evidence in advance of the criminal

trial might hamper the selection of an unbiased jury and thus prejudice the criminal defendant."

The Court went on to rule that no justification exists for publicizing the fruits of civil discovery:

"Indeed, only the civil judge and the civil [parties'] counsel need know what is disclosed, and counsel may be expressly enjoined from sharing the information with other persons pending the criminal trial."

B. Neither Shell Nor the Government Would Be Prejudiced by the Issuance of the Protective Orders. Indeed the Government Is Constitutionally Precluded from Utilizing, in the Criminal Proceeding, Any Information Developed Through the Compulsory Processes of Civil Pre-Trial Discovery.

The plaintiffs again emphasize that they are not here seeking to avoid complying with Shell's request for discovery. On the contrary, plaintiffs have demonstrated that issuance of the protective orders will create an atmosphere of full and cooperative disclosure more in keeping with the spirit of federal discovery policies.

A closer scrutiny of the arguments against the protective orders, then, reveals Shell's true purpose for opposing their issuance—to pressure and coerce plaintiffs into dismissing the civil action for fear of implicating and incriminating themselves in the related criminal prosecution. Shell admits that the Department of Justice has a "very real desire" to see the transcripts of plaintiffs' depositions. Moreover, Shell brought to the attention of the Court below a letter from the Department of Justice officials requesting copies of all depositions (Appendix "A", *infra*). It must be assumed that the Government would have an equally enthusiastic sense of curiosity

regarding plaintiffs' answers to interrogatories and other documents.

Shell justifies its proposed cooperative exchange of information with the Government by reliance on the "Publicity in Taking Evidence" Act, 15 U.S.C. § 30 (1964). This reliance is misplaced, for the Act is addressed to testimony which is taken by the Government. Plaintiffs are not here attempting to suppress information presently in the possession of the Government. Rather plaintiffs seek to preclude Shell from supplying potentially incriminating information to the Government.

Similarly, in *Olympic Refining Co. v. Carter,* 332 F.2d 260 (9th Cir. 1964) this Court stated that Rule 30(b) should not be used to keep relevant information from private litigants seeking to enforce private antitrust claims. In *Olympic,* the Government already had the information and the removal of the protective order (which had for four to eight years prohibited the Government from divulging the information) in no way carried the risk of potential self-incrimination. Indeed, the Congressional statute and *Olympic* case cited by Shell could not be sustained if they are here construed to permit an impairment of the Fifth Amendment privilege against self-incrimination.

As Judge Koelsch of this Court stated in the *Hashagen* case:

> "The emulous conflict between the government's right to information including the consequent duty of the citizen to testify, and the witness' right not to incriminate himself *must be balanced in favor of the Constitutional privilege.* If at times this results

> in *closing and locking the doors of discovery to the government,* that is but a calculated and foreseen consequence of recognizing this *basic right in a free society.*'' 283 F.2d at p. 348 (Emphasis added.)

Clearly, the Government, in its criminal action, is not entitled to the kind of discovery sought here. Important differences in policy account for the distinctions in civil and criminal discovery. Denial of the plaintiffs' request for protective orders would be tantamount to abrogation of this wise policy distinction.

As the Fifth Circuit Court of Appeals astutely observed in the recent case of *Campbell v. Eastland,* 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963):

> ''. . . [A] judge should be sensitive to the difference in rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. . . . Separate policies and objectives support these different rules.
>
> ''. . . *A litigant should not be allowed to make use of the liberal* [*civil*] *discovery procedures . . . to avoid the restrictions on criminal discovery* and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. *Judicial discretion should be utilized to harmonize the conflicting rules* and to prevent . . . the policies applicable to one suit from doing violence to those pertaining to the other.'' (Emphasis added.)

Thus, the Government's position, as articulated by Shell, is untenable. This Court should not use its power

to subject the criminally accused to the same processes of searching discovery which have heretofore been restricted to civil cases. Such an action by this Court would go far in the direction of negating the constitutional privilege against self-incrimination and thereby compelling an accused to convict himself through his own testimony. Such a ruling would do violence to the spirit of the recent line of Supreme Court decisions which have elevated the privilege to a nearly absolute level of constitutional protection. *Miranda v. Arizona,* 384 U.S. 436 (1966); *Spevack v. Klein,* 385 U.S. 511 (1967); *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Griffin v. Calif.,* 380 U.S. 609 (1965).

It is well established that this Court has the power, under Rule 30(b), to balance and resolve all of the conflicting interests and policies involved in this present dispute. Indeed, the Court should here use "equitable powers of courts of law over their own process to prevent abuses, oppression and injustices". *International Products v. Koons,* 325 F.2d 403, 408 (2nd Cir. 1963). The issuance of a protective order in this case would be unequivocally consistent with this standard: (a) it would foster and encourage a more effective program of discovery by Shell; and (b) it would protect plaintiffs' disclosures from being used against them in the pending criminal cause. Should the Government complain, its plea should be ignored. The Government, as criminal prosecutor, has no right to the fruits of civil discovery; it should not be heard to complain because it "lost" what would otherwise have been a "windfall". To permit Shell to use its discovery as a "club" to coerce plaintiffs to

incriminate themselves is the type of "abuse", "oppression" and "injustice" that Rule 30(b) was designed to prevent. *Harrigan & Sons v. Enterprise Animal Oil Co.,* 14 F.R.D. 333 (E.D. Pa. 1953).

In a number of cases in which parties to a civil action were also implicated in a pending related criminal case, courts have enthusiastically applied Rule 30(b) in order to protect the privilege against self-incrimination from being circumvented through the use of liberal civil discovery. *National Discount Corp. v. Holzbaugh,* 13 F.R.D. 236 (E.D. Mich. 1952); *Harrigan & Sons v. Enterprise Animal Oil Co., supra; Perry v. McGuire,* 36 F.R.D. 272 (S.D. N.Y. 1964); *U.S. v. Parrott,* 248 F.Supp. 196 (D.C. 1965).

In the *National Discount* case, *supra* (at page 237 of the opinion), the Court ruled that to require a party against whom a criminal action was pending to submit to the normal avenues of civil discovery (in a related civil case) *"would be oppressive* and, at least, an indirect violation of his constitutional rights. *Justice requires* that the defendant . . . be protected from this type of oppression and this indirect invasion of his rights . . ." (Emphasis added)

In its brief (page 11, *et seq.*), Shell contends that it will be prejudiced in the preparation of its case if it is not permitted to disclose the information discovered to its operating personnel and other third parties. In making this contention, Shell has read a portion of the protective order out of its proper context. The parties and their counsel are given full access to information for the purposes of preparing their case. Counsel will be aware of

the information when he questions Shell's operating personnel and other third parties.

However, the constitutional rights of the plaintiffs must be protected. Thus Shell and its counsel may not freely reveal the testimony of the plaintiffs lest the federal prosecuting officials gain access thereto and utilize such potentially self-incriminating testimony to aid in the criminal prosecution of the plaintiffs. As Judge Hastie stated in *U.S. v. American Radiator & Standard Supply Corp., supra:*

> "Indeed, only the civil judge and the civil [parties'] counsel need know what is disclosed, and counsel can be expressly enjoined from sharing the information with other persons. . . ."

Typically the remedy afforded in these cases is an order staying civil discovery pending termination of the criminal prosecution. However, here the criminal action is delayed indefinitely (having been removed from the calendar) and the requested protective orders are far more reasonable under the circumstances.

Judge Hastie in the *American Radiator* case reversed a District Court's order staying civil discovery pending termination of a related criminal action, observing that application for a protective order would more appropriately resolve the competing interests involved.

United States v. Simon, 373 F.2d 649 (2nd Cir. 1967) is also instructive. There, Judge Bryan of the District Court for the Southern District of New York (where a criminal action was pending) enjoined the plaintiff in a related civil case (pending in the Eastern District of

New York) against the same defendant from proceeding with discovery. Although the Second Circuit Court of Appeals reversed, ruling that one court does not have the power to enjoin actions being taken in another court, Judge Lumbard in the majority opinion indicated that a claim by a criminal defendant that civil discovery "would be oppressive and would infringe on his constitutional rights" would be a proper basis for issuance of an order under Rule 30(b) by the court in which the civil action was pending. 373 F.2d at 654.

Thus, it is clear that a stay of proceedings is not necessary. The interests of the plaintiffs and of Shell would be fully protected and encouraged by the issuance of both protective orders sought by the plaintiffs.

Shell argues that if a protective order is permitted here, such will open the floodgates and stand as authority for issuance of similar orders in all civil antitrust cases (because of potential criminal sanctions). This is not true. Protective orders are necessary in the present case because of the existence of an *actual pending criminal case* which is *identical* in its *allegations* to the counterclaim in this civil action. This similarity of issues, combined with the announced desires of the federal prosecuting officials for copies of depositions, necessarily means that civil discovery will result in the disclosure of potentially incriminating information. Thus, plaintiffs need the protective orders to effectively safeguard their constitutional privilege against self-incrimination.

III. PLAINTIFFS HAVE NOT IRREVOCABLY WAIVED THEIR CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BY THE FILING OR PROSECUTION OF THEIR CIVIL ANTITRUST SUIT AGAINST SHELL.

In opposing plaintiffs' motion for a protective order under Rule 30(b), defendant Shell argues that plaintiffs are somehow stripped of their constitutional protection because they have initiated the proceding. Note, however, that Rule 30(b) does *not* indicate that only defendants may obtain protective orders. Clearly, such orders are available to all parties who show cause for issuance.

Even more astounding, however, is the defendant's implication that by the initiation of a civil action plaintiffs thereby waive their constitutional immunity from self-incrimination. Such an interpretation would demonstrate little regard for a constitutional protection of such high value. *Malloy v. Hogan, supra; Miranda v. Arizona, supra.*

This line of argument clearly illustrates Shell's true purpose in opposing the present order. For Shell is saying to the plaintiffs: unless you drop your antitrust claim, all the avenues of civil discovery which are available will be used to gather information and such will be communicated to the Government for use in its criminal prosecution against you. Plaintiffs have argued above that this Court should exercise its discretion and invoke its equitable power under Rule 30(b) to extricate plaintiffs from this oppressive and unjust dilemma. For if the Court approves the defendant's position and rules to deny protective orders, such action would effectively negate the plaintiffs' constitutional privilege against self-incrimination. Therefore, denial of the order would vio-

late the Fifth Amendment to the Constitution of the United States.

Recently, in *Stevens v. Marks,* 383 U.S. 234 (1966), the United States Supreme Court emphatically condemned procedural practices which mechanically operate in such a manner as to result in a waiver of the privilege. In that case, a policeman had signed a waiver of the privilege under pain of being discharged, but subsequently reconsidered and reinvoked his right to remain silent. The Court ruled that the reassertion of the privilege was justified:

> "We hold that the petitioner's effort to withdraw the waiver was effective, and that *in the absence of an immunity provision clearly made applicable to him,* petitioner could properly stand on his privilege and refuse to answer potentially incriminating questions". (Emphasis added)

This language used by the Court has particular relevance to our present case. Shell seeks to coerce the plaintiffs into providing it with information which will be made available to assist the Government in the criminal prosecution of the plaintiffs. If this Court believes that the plaintiffs have waived their privilege by initiating the action—it must further recognize the significance of *Stevens v. Marks* and permit plaintiffs to reinvoke the constitutional privilege unless a protective order (comparable to "an immunity provision" in *Stevens*) is granted and "made applicable" to the plaintiffs. The plaintiffs are not here attempting to use the privilege against self-incrimination as a shield of silence and thereby prohibit the defendant from engaging in discov-

ery. The plaintiffs are most willing to submit to proper discovery so long as the information revealed is kept beyond the reach of the prosecuting authorities. Under *Stevens v. Marks* it is clear that plaintiffs have the right to this protection as a condition to their waiver of the privilege and submission to discovery. Nor, as has been shown in argument II above, with Shell be prejudiced by this order. Indeed, they will, in all probability, enjoy more effective discovery.

In *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), the Supreme Court invalidated a portion of a Congressional Act which provided for an automatic waiver of the privilege against self-incrimination. The Court ruled that such an automatic waiver should not be recognized unless it "supplies a complete protection from all the perils against which the constitutional prohibition was designed to guard . . . by affording absolute immunity against future prosecution. . . ." (at page 80). Thus, if defendant desires plaintiffs to waive their privilege as a condition to going forward with this civil litigation, the minimum protection to which the plaintiffs are entitled is the shelter of the requested protective order.

No discussion of the value of the privilege against self-incrimination or the reluctance of courts to find a waiver of that privilege would be complete without mention of the celebrated case of *Miranda v. Arizona, supra.* There, as here, prosecuting officials were attempting to obtain pre-trial incriminating statements from one suspected to be implicated in criminal activity. In *Miranda* the Court recognized the privilege as "one of our Nation's most

cherished principles". (at pages 457-458). Perhaps more important to our present case is the Court's following statement:

> "We have recently noted that the privilege against self-incrimination—*the essential mainstay of our adversary system*—is founded on a complex of values. . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. . . . [T]o respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, *rather than by the cruel, simple expedient of compelling it from his own mouth*". (at page 460) (Emphasis added)

What the *Miranda* court stated concerning the evils of incommunicado interrogation is equally applicable to the apparent conspiracy (between the Government and Shell) to circumvent the plaintiffs' constitutional privilege in the present case. Both have the effect of providing information to prosecuting officials which they are not entitled to. In *Miranda* the prosecuting officials used secrecy—here they use a legal technicality which coerces their victims to submit a wealth of detailed information. In either case, even if the accused waives his privilege, he may re-assert it at any subsequent time. Indeed, a "heavy burden rests on the Government to demonstrate that the accused knowingly and intelligently waived his privilege". The Supreme Court has always set high and rigorous standards for proof of waiver of constitutional rights. *Miranda v. Arizona,* 384 U.S. at 475; *Johnson v. Zerbst,* 304 U.S. 458

(1938). Again we can look to *Stevens v. Marks, supra,* and to Judge Koelch's opinion in the *Hashagen* case for relevant insight into the solution of the problem here presented: Even though assertion of the privilege obstructs the conduct of a proceeding,

> " 'waiver of Constitutional rights is not lightly to be inferred'; a necessary corollary is that *the doctrine of waiver should be confined in its operation to narrow limits* and charily applied else the Constitutional guarantee would be effectively nullified by a mere expedient." 283 F.2d at p. 353. (Emphasis added.)

These cases, then, clearly demonstrate that the mere filing of a civil suit for damages by plaintiffs does not automatically divest them of their constitutional privilege against self-incrimination. Indeed, such a waiver cannot be found by this Court unless it supplants the protection of the privilege by providing an immunity at least as broad as the requested protective orders.

IV. TO COMPEL PLAINTIFFS TO CHOOSE BETWEEN THEIR RIGHT TO REMAIN SILENT AND THEIR RIGHT TO PROSECUTE THE CIVIL ANTITRUST SUIT HEREIN UNJUSTIFIABLY CONDITIONS THEIR CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION IN VIOLATION OF THE FIFTH AMENDMENT.

Shell contends that even though plaintiffs may not have irrevocably waived their privilege, nevertheless assertion of the privilege is inconsistent with the pressing of the present civil antitrust action. Therefore, Shell would require the plaintiffs to make an election between invoking the privilege *or* carrying on with the civil suit. Such an argument is untenable and anachronistic in its failure to

recognize and understand the flood of recent decisions by the United States Supreme Court which have elevated the protection of the privilege to a near absolute constitutional status. *Malloy v. Hogan, supra; Miranda v. Arizona, supra; Albertson v. Subversive Activities Control Board, supra; Spevack v. Klein, supra* (and other cases too numerous to cite).

Shell's argument, and its citation of *Independent Prod. Corp. v. Loew's,* 22 F.R.D. 266 (S.D.N.Y. 1958), reflects the rationale of the Supreme Court's decision in *Lerner v. Casey,* 357 U.S. 468 (1958), where a public employee was dismissed because, by asserting his right to silence, he failed to carry the burden of proving his loyalty and moral fitness—conditions of employment. *Lerner* is distinguishable from our own case, and the underlying reasoning behind this distinction paves the way for a decision in plaintiffs' favor on the motions herein involved. Our case is not like *Lerner, Independent Prod. Corp.,* or the numerous other decisions wherein an individual's assertion of the privilege against self-incrimination directly conflicted with a duty independently owed by the invoking party. *Beilan v. Bd. of Education,* 357 U.S. 399 (1958). The defendant would like to convince this Court that such a conflict does exist here; that should plaintiffs invoke the privilege, such would constitute a breach of their duty to cooperate in the discovery process. In point of fact, it is really Shell who, by its unrealistic position in opposing the issuance of the protective order, is causing this dilemma to be created. Indeed, if the Court grants the protective orders, the *Lerner* dilemma will be averted; plaintiffs will be able to fully cooperate with Shell's discovery requests, and at the same time be fully

(1938). Again we can look to *Stevens v. Marks, supra,* and to Judge Koelch's opinion in the *Hashagen* case for relevant insight into the solution of the problem here presented: Even though assertion of the privilege obstructs the conduct of a proceeding,

> " 'waiver of Constitutional rights is not lightly to be inferred'; a necessary corollary is that *the doctrine of waiver should be confined in its operation to narrow limits* and charily applied else the Constitutional guarantee would be effectively nullified by a mere expedient." 283 F.2d at p. 353. (Emphasis added.)

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protected from the danger of having the Government use these disclosures to improperly circumvent the plaintiffs' Fifth Amendment immunity. We reiterate—plaintiffs are not attempting to block proper discovery (as was the case in *Lerner* and in *Independent Prod. Corp.)*—they are merely seeking to prevent the discovered facts from being improperly used by the Government in a criminal action.

Indeed, in the *Independent Prod. Corp. v. Loew's* case, the issue primarily concerned plaintiff's alleged absolute First Amendment right to remain silent. The plaintiff's assertion of the Fifth Amendment privilege against self-incrimination and related request for a protective order were improperly raised and thus not considered by the court. In a subsequent appellate review of the *Independent Prod. Corp.* case, the Second Circuit Court of Appeals ruled that the trial court abused its discretion in dismissing the complaint because of plaintiff's assertion of his Constitutional privilege against self-incrimination in refusing to submit to unprotected discovery. 283 F.2d 730 (2nd Cir. 1960). If plaintiffs here are unsuccessful in obtaining protective orders the doors will be open for numerous Governmental attempts to avoid the restrictive rules of *criminal* discovery, by improper utilization of the fruits of *civil* discovery, thereby treading with impunity upon criminal defendants' valuable privilege against self-incrimination. This Court, in recognizing the paramount policies of the constitutional immunity, must rule in favor of the plaintiffs herein.

The defendant's contention that plaintiffs must choose between their right to petition a court for civil relief or their constitutional right to silence must also fail on the authority of the United States Supreme Court's decisions

in *Slochower v. Bd. of Education, supra,* and *Spevack v. Klein, supra.*

In *Slochower,* a school teacher was dismissed because of his assertion of the Fifth Amendment. The Supreme Court reversed, ruling that Slochower's assertion of the privilege was not a proper basis for dismissal. The same reasoning should lead this Court to rule that plaintiffs need not be forced to choose between the right to bring a civil suit and the right to remain silent. Compelling such an "election" usually reflects the official belief that individuals who invoke the privilege against self-incrimination are probably guilty of some illegality. But as Mr. Justice Clark stated in *Slochower,* "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances". If this Court refuses the plaintiffs' motion, Shell and the Government will most certainly attempt to "ensnare" plaintiffs in a web of "ambiguous circumstances". Where, as here, plaintiffs are forced to choose "between the rock and the whirlpool, duress is inherent in deciding to 'waive' one or the other". This Court must not sanction such "a watered-down version of constitutional rights". *Garrity v. New Jersey,* 87 S.Ct. at pp. 619-620.

The plaintiffs, in filing their private antitrust suit, are pursuing an activity guaranteed to all citizens of the United States by our Constitution—the right to access to the federal courts for redress of private wrongs. *Crandall v. Nevada,* 73 U.S. 35 (1867). Moreover, in pursuing this private treble damage antitrust claim the plaintiffs

are fulfilling an important component of the public interest in "vigilant enforcement of the antitrust laws". *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 329 (1955). These considerations would seem to prohibit dismissal of plaintiffs' action except under extreme circumstances not present in our case. *Independent Prod. Corp. v. Loew's,* 283 F.2d 730 (2nd Cir. 1960).

The most recent and most significant case prohibiting the practice (here urged by Shell) of forcing individuals to choose between their right to silence or a civil proprietary right (such as the right to employment, the right to practice law or the right to bring a civil suit) is *Spevack v. Klein, supra.* In *Spevack,* a 1967 decision, the United States Supreme Court ruled that a private citizen's privilege against self-incrimination is unconstitutionally abridged in instances where he is coerced into choosing between waiver of the privilege or loss of an alternative proprietary right. As Mr. Justice Douglas stated:

> ". . . the Self-Incrimination Clause . . . should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. . . .
>
> ". . . The Fifth Amendment guarantees . . . the right of a person *to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence.* (Citing *Malloy v. Hogan, supra.)*
>
> "In this context, 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of *any sanction which makes assertion of the Fifth Amendment privilege 'costly'." Spevack v. Klein,* 87 S.Ct. at pp. 627-628. (Emphasis added.)

To condition plaintiffs' right to invoke silence by compelling them to cease pressing their civil claim would clearly constitute the imposition of a "sanction" designed to make assertion of the privilege extremely "costly". Such a practice would be violative of the Fifth Amendment.

In a companion case, *Garrity v. New Jersey,* 385 U.S. 511 (1967), the Supreme Court condemned the practice of using the denial of a quasi-proprietary right as a "club" to coerce an individual into giving information which could be used against him in a related collateral criminal proceeding. The Court viewed "the choice between self-incrimination or job forfeiture" as an unconstitutional "form of compulsion". *Garrity v. New Jersey, supra.*

In reading the principles of *Spevack, Garrity, Slochower, Stevens v. Marks, supra,* and *Albertson,* into Rule 30(b) and our own factual situation—it becomes clear that plaintiffs' motion for a protective order must be granted. The plaintiffs have the right to bring the present civil antitrust action; the defendant has the right to conduct discovery. Inasmuch as Shell and the Government are working on a common issue as against the plaintiffs (and especially in light of Shell's willingness to cooperate with the Government here), the plaintiffs have the constitutional right to object to submitting to such discovery.

Shell's contention that plaintiffs have waived their privilege must clearly fail on the reasoning of *Stevens v. Marks, supra,* and *Albertson v. Subversive Activities Control Board, supra.* Shell's contention that plaintiffs must

then choose between asserting their privilege and further prosecuting their civil suit is equally untenable. As recognized in *Spevack, Garrity,* and *Slochower,* the privilege against self-incrimination is far too valuable a liberty to be subjected to this type of technical "blackmail". The Supreme Court has condemned as unconstitutional practices which indirectly coerce such losses or "waivers" of the right to silence. To place the plaintiffs in such an *unnecessary* dilemma in the present case would result in a violation of the Fifth Amendment to the Constitution of the United States.

V. CONCLUSION

The Court in the present case has the opportunity to easily avoid a significant constitutional issue. By applying the cherished principles underlying the privilege against self-incrimination to the dictates of Rule 30 (b), this Court would be encouraging the District Court to wisely exercise its equitable and discretionary powers.

If the protective orders are granted, the civil suit could proceed, defendant could engage in discovery, and plaintiffs would be protected from having their admissions improperly used as evidence or investigatory leads in the criminal action pending against them. *Albertson v. Subversive Activities Control Board, supra.*

On the other hand, if plaintiffs' motion is denied, this Court will be creating a situation which is most perilous to the plaintiffs' liberties as guaranteed by the Fifth Amendment. In the final analysis, the granting of the motion for a protective order is the only available alternative which is consistent with all of the competing

constitutional, legislative, and procedural policies here involved. Rule 30(b) must be utilized to keep criminal discovery within proper and reasonable bounds.

Dated, San Francisco, California,
January 16, 1968.

Respectfully submitted,
JOSEPH L. ALIOTO,
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KEITH E. PUGH, JR.,
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By MAXWELL M. BLECHER,
Attorneys for Appellees in No. 22,441 and Appellants in No. 22,441-A.

JAMES D. GLENN, JR.,
DAVID H. BOWERS,
HIRSHON, GERHARDT & BOWERS,
Of Counsel.

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL M. BLECHER.

(Appendices A, B, C and D Follow)

Appendices A, B, C and D

Appendix A

Department of Justice
450 Golden Gate Avenue — Room 16432
Box 36046
San Francisco, California 94102

Air Mail July 31, 1967

William Simon, Esq.
Howrey, Simon, Baker & Murchison
1707 H Street, Northwest
Washington, D. C. 20006

Dear Mr. Simon:

It would be appreciated if you could furnish us with copies of all depositions taken by you in *Russell L. Jones, et al. v. Shell Oil Company,* Civ. 47261.

United States v. California Shell Dealers Association, Cr. 41348, has been given a trial date of October 23, 1967. It may be of interest to you that on July 28, at the request of Mr. Alioto's firm which represents the defendants, we signed a stipulation that all proceedings in this case were to be taken off calendar pending a decision by the Fifth Circuit Court of Appeals in two cases interpreting Criminal Rule 16(a)(3).

Thank you for your cooperation.

Sincerely yours,
Edwin M. Zimmerman
Acting Assistant Attorney General
Antitrust Division
/s/ Lyle L. Jones
Lyle L. Jones
Chief, San Francisco Office

Appendix B

In the United States District Court
for the Northern District of California

No. 47261

Russell L. Jones, et al.,
Plaintiffs,
vs.
Shell Oil Company,
Defendant.

Protective Order Pursuant
to Rule 30(b) of the
Federal Rules of Civil Procedure

Plaintiffs, having moved for protective order pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, the issue having been fully briefed, and after oral argument, the Court being fully advised in the premises,

It Is Hereby Ordered that the examination of the plaintiffs by deposition shall be held with no one present except the parties to the action and their officers or counsel.

It Is Further Ordered that all transcripts, transcribers' notes or other form of record of the examination of the plaintiffs by deposition and all of the information contained therein shall be retained by the parties, their

counsel and the transcriber, and shall be used by them solely in the preparation for trial or in the trial of this action; and that said record and information shall not be disclosed to the operating personnel of the defendant or to any third parties; and at the termination of this action the defendant and the transcriber shall return to the plaintiffs all of the above described materials.

It Is Further Ordered that the transcripts of the examination of the plaintiffs by deposition shall be placed under seal and shall be so filed with the Court and shall be opened only by order of the Court.

Dated: October 12, 1967.

Stanley A. Weigel
Judge

Appendix C

Written Interrogatories,
Set Number One, to the Plaintiffs

* * * *

. . . 5. (a) State for each day during the relevant time period the net price at which you sold each grade of gasoline, (b) the date of each change in your price, (c) the new price charged to you after each such change, and (d) your gross margin of profit (difference between net cost and selling price) per gallon at each such selling price.

* * * *

12. (a) Did you at any time during the relevant period offer to any of your customers trading stamps, premiums, contests, give-aways, or any other type promotion; and (b) if your answer is in the affirmative,

(i) describe each such activity and give the dates during which each such promotion was in effect;

(ii) describe the terms and conditions on which you offered each such promotion (*e.g.,* one trading stamp per 10¢ purchase);

(iii) give the cost to you of each such activity both in cost per unit and in total monthly cost during the time each such promotion was in effect; and

(iv) state to what extent, if any, your gasoline supplier participated in the cost of each such promotion.

13. State whether, at any time during the relevant period, you did not display or utilize price signs at your

station (not including price data on the pumps); and if so, the dates during which you did not have such price signs.

14. State the size, type, location and number of all price signs you did display or utilize during the relevant time period, and the dates or time periods when each such price signs were so utilized by you.

* * * *

18. (a) Give the name of each group or association of dealers of which you were a member at any time during the relevant period; and (b) as to each such group or association state:

(i) the period of time you were a member,

(ii) any position or office held by you, the time during which you held such office, and your duties connected therewith,

(iii) the names, addresses, and time period of all officers,

(iv) the date and location of each meeting of which you have knowledge, and whether attended by you,

(v) the amount of dues paid annually by you,

(vi) whether there were any special assessments to which you contributed, the purpose, date of payment and the amount therefor, and

(vii) whether you participated in any form of activity or project conducted, sponsored, or supported by the association, and, if so, (1) the date thereof, (2) the names of the persons participating therein with you, (3) the nature of your participation, (4) the person or per-

sons who organized the activity, and (5) the purposes of the activity.

19. (a) List and describe each record, writing or document (i) received by you from, or (ii) to your knowledge transmitted or distributed to anyone by, during the relevant period, any group association listed in response to Interrogatory No. 18; and (b) state (i) the date of such writing, (ii) by whom sent, (iii) to whom sent, (iv) the general subject matter thereof, and (v) the current location thereof.

20. (a) Are you a co-conspirator as alleged in the complaint with whom Shell is alleged to have entered into the agreements with retailers described in the complaint; and (b) name every other such co-conspirator known to you.

Dated: July 10, 1967.

Appendix D

United States District Court
Northern District of California

Civil Action No. 47261

Russell L. Jones, et al.,
Plaintiffs,
vs.
Shell Oil Company,
Defendant.

Order

This cause coming on for hearing on the motion of the plaintiffs, Russell L. Jones, et al., for an order that plaintiffs' answers to Shell Oil Company's Interrogatories 5, 12, 13, 14, 18, 19, 20 and 21, First Set, be filed under seal and that said answers be kept in confidence, and the Court having heard arguments of counsel and being fully advised in the premises.

It Is Ordered that the foregoing motion of the plaintiffs be and the same is hereby denied.

Approved as to form

Keith E. Pugh, Jr.
Attorney for the Plaintiffs

Entered:
/s/ William T. Sweigert
United States District Judge

Date: November 20, 1967